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No. 692

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In the

Supreme Court of the United States

OCTOBER TERM, 1967

PAUL V. BYRNE, JR.,

Petitioner,

vs.

CHICAGO TITLE AND TRUST COMPANY, individually and as trustee of trust agreements No. 42212 and No. 44999; THE CATHOLIC BISHOP OF CHICAGO, a corporation sole; THE FIRST NATIONAL BANK OF CHICAGO, individually and as trustee of trust agreement No. 51296-6; ROGERS, PAUL and HANSEN; QUINN, JACOBS, BARRY, and LATCHFORD; QUINN, JACOBS and BARRY; JOHN B. HENDRICKS; FRANCIS E. SCHLAX; ROBERT V. HOGAN; FRANK A. KARABA; DON W. FEELEY; KIRK L. MacKINNON; GEORGE A. HANSEN; VLADMIR G. URSE, LORETTO TENNES, individually and as trustee of the Thomas Byrne Estate Liquidation trust; ALBERT BUCKLEY; DONALD MASTERSON; NORA CAMPION; THADDEUS ADESKO; and ROBERT L. HUNTER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SEVENTH CIRCUIT

PAUL V. BYRNE, JR.,
10 South LaSalle Street
Room 1030
Chicago, 60603, Illinois
Petitioner

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PAUL V. BYRNE, JR., petitions this Court to issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit on the following grounds:

1. (a) There were no opinions, reported or unreported, official or unofficial, of the Courts below in this case. A copy of the judgments rendered in the Courts below is submitted on pp. 4 and 5 below.

(b) Jurisdiction of this Court is invoked under the statutory provisions of Title 28 USCA §§ 1254(1), 2101 (c) and is addressed to the Court's sound judicial discretion in exercising its supervisory power where the court of appeals has sanctioned a lower court's departure from the accepted and usual course of judicial proceedings; has decided an important federal question in a way in conflict with applicable decisions of this Court, and has decided in conflict with the decisions in other circuits.

The time factor of this Court's jurisdiction rests on the Seventh Circuit Court of Appeals decision rendered on June 8, 1967, (A. 37), denying petitioner's motion to reconsider the dismissal of the appeal rendered on April 13, 1967, (A. 35), and also denying respondents' motion to strike petitioner's motion, and an extension of the time for filing this petition to October 6, 1967 granted by Justice Black on August 30, 1967.

(c) The questions here presented for review are:

I. Can a State classify persons, without consent, as subjects for experimental research to benefit society without adhering to precise standards of classification required by the Fourteenth Amendment?

II. In taking a person's property and liberty, how far can State action go in pursuit of a valid State interest before tolling the individual's Constitutional defenses?

III. Is petitioner, under the admitted facts in this case, entitled to be heard fairly and impartially on the merits of his claim in a federal court without regard to his financial status?

IV. Is this Court's interpretation and construction of an Act of Congress, binding on the lower federal courts and do the records of a federal court import absolute verity?

(d) The following federal constitutional and statutory provisions are involved in the facts of this case: (i) Amendments 1, 4, 5, 6, 8, and 14 to the Constitution of the United States, Title Amendments 1-5 USCA, p. 4, 5, 6 (1961 ed.), (A. 38); Statutes of the United States:

Title 7 USCA § 2131, p. 137 (supp.) 1964 ed. (A. 39)
Title 28 USCA § 453, p. 465 (1949 ed) (A. 39)
Title 28 USCA § 1343, p. 202 (1962 ed) (A. 39)
Title 28 USCA § 1654, p. 13 (1966 ed) (A. 40)
Title 42 USCA § 1983, p. 98 (1964 ed) (A. 40)
Title 42 USCA § 1985, p. 226 (1964 ed) (A. 40)

(iii) Illinois Statutes involved are:

A. (Petition to abandon cemetery lot) ch. 21 §21.3, Ill. Rev. Stat. (1963) vol. 1, p. 474 (State Bar Assn. ed).

B. (Application for license) ch. 16½ § 34(d) Ill. Rev. Stat. (1963) vol. 1, p. 330 (State Bar Assn. ed).

C. (Jurisdiction of County Court) ch. 91½ § 2-2 Ill. Rev. Stat. (1963) vol. 2, p. 823 (State Bar Assn. ed).

D. (Authority of Superintendent) ch. 91½ § 6-3 Ill. Rev. Stat. (1963) vol. 2, p. 829 (State Bar Assn. ed).

E. (Psychiatric or psychological counseling or sociological training) ch. 108 § 122 Ill. Rev. Stat. (1963) vol. 2, p. 1240 (State Bar Assn. ed).

STATEMENT OF THE CASE

This petition is before the Court on the complaint and motions to dismiss for failure to state a claim.

The Honorable James Parsons of the District Court for the Northern District of Illinois, Eastern Division gave petitioner leave to commence this suit in forma pauperis on July 27, 1966 (R. 3).

The case was regularly assigned to the Honorable Bernard Decker who was then on vacation during the Court's summer recess. Jurisdiction of the Court was invoked under the provisions of Title 42 USCA §§ 1983, 1985 and Title 42 USCA § 1343 (R. 5, 6, 219).

On September 14, 1966 upon Judge Decker's resumption of the bench at a hearing on petitioner's motion to obtain discovery, petitioner was informed that the complaint had already been dismissed from the chambers of the Honorable Joseph Perry on September 9, 1966, (R. 253). Judge Perry, while sitting as emergency recess judge on August 17, 1966, had taken the case "under advisement" on motion of eleven of the respondents (R. 378).

Judge Perry's order dismissing the complaint which reads:

> "ORDER: Each and every defendant has moved to dismiss the complaint herein and has set forth the grounds therefor and each has adopted all of the grounds claimed by all the others. Briefs of the parties have been filed and the court, having considered the complaint and the motions to dismiss, finds each of the motions well taken.
>
> It is therefore ORDERED that the motions of the defendants and each of them be and they hereby are granted and the complaint is dismissed as to each and every defendant named therein for the various reasons set forth in said motions." (R. 253; A. 32).

is based on false affidavits of service (R. 256, 257, 259, 260) and was rendered without hearing or argument on any of the motions before the court.

Petitioner's attempts on July 19, 1966 to have Judge Decker vacate Judge Perry's dismissal (R. 272); to strike the false affidavits of service (R. 278); and for leave to amend the complaint were denied by Judge Decker serially, on September 19, 23, and 28, 1966. (R. 391, 418)

Petitioner's appeal from the orders of the District Court were dismissed by the Court of Appeals without hearing or argument on April 17, 1967 stating: (In relevant part)

> "On further consideration of the several motions of defendants-appellees to dismiss this appeal, the answer of plaintiff-appellant thereto, the brief and appendix filed herein by plaintiff-appellant;
> It Is Ordered by the Court, that this appeal be and the same is hereby dismissed for the reason that plaintiff-appellant's complaint does not state a claim upon which relief can be granted under the Civil Rights Statutes, 42 U.S.C.A. §§ 1983 and 1985, and on the further authority of a prior decision of this Court as reported in *Byrne* v. *Kysar,* 7 cir., 347 F.2d 734 (1965)." (A. 35);

and on June 8, 1967 the Court of Appeals denied petitioner's motion to reconsider the dismissal of the appeal (A. 37) without determination of petitioner's request for leave to proceed in forma pauperis (A. 1-31).

The federal questions raised by petitioner's complaint were detailed in State Court proceedings before the Courts below, (R. 17 to 69, A. 1 to 31) which showed that between 1962 and 1965 the respondents, acting in concert under color of Illinois law, succeeded in accomplishing the devastation of petitioner's estate (then ap-

proximating $50,000.00) and his person by having petitioner arrested, jailed, stripped of his home, family, inheritance and good repute.

The blending of civil and criminal State Court proceedings commenced with a civil suit initiated by respondents Chicago Title and Trust Company and Robert V. Hogan on September 20, 1962 to force petitioner out of his home (R. 17, 18; A. 17). Next, petitioner was arrested, jailed, fingerprinted and released on bond on December 20, 1962 (R. 21, A. 18) on fictitious charges by respondents (R. 19, A. 18) that were dropped on January 24, 1963 (R. 19, A. 18).

The merry-go-round, in the meantime, turned to a "civil" proceeding on January 9, 1963 when petitioner was arrested on a document labeled "petition" (R. 43, A. 27) at his place of employment as he was about to commence work at 8 p.m. and placed in the custody of respondent URSE (R. 43) who for 10 consecutive days next ensuing held petitioner incommunicado, without access to telephone or United States mail, and kept him forcibly drugged each day (R. 22, 23, A. 19). During a short interlude on the seventh day of petitioner's incarceration (January 16, 1963) the respondents Schlax, MacKinnon and Adesko conducted a proceedings (R. 24-41, A. 19-26) denominated "judicial" and "civil" in a small chamber provided by respondent URSE far removed from any court house to which petitioner was brought semi-comatose.

The brief inquisitorial proceedings, unburdened by any fact finding process, show the purported appearance of respondent MacKinnon (whom petitioner has yet to meet), as "attorney for defendant" (R. 42, A. 26) as well as a novel notion of advocacy (R. 24-41, A. 19-26).

Pursuant to the orders entered by respondents, petitioner was punished by commitment to close confinement and the threat of forced psycho-surgery for the welfare of the public, until April 15, 1963 (R. 13, R. 11, A. 9).

The remnants of petitioner's estate including a $24,000.90 inheritance over which respondent First National Bank took control on April 20, 1964, in a fiduciary capacity (R. 14, 15, A. 12, 13), were readily gathered and sequestered by the various respondents participating in concert in subsequent civil proceedings (R. 44-69, A. 29-31) between June 1963 and October 1965.

The judicial jurisdiction upon which the respondents based their authority to pick petitioner clean of his property is founded on a decree (R. 65, 66) entered in ex parte proceedings (R. 47-60) conducted without notice to petitioner or according to law. (R. 13)

ARGUMENT

I.

CAN A STATE CLASSIFY PERSONS, WITHOUT CONSENT, AS SUBJECTS FOR EXPERIMENTAL RESEARCH TO BENEFIT SOCIETY WITHOUT ADHERING TO THE PRECISE STANDARDS OF CLASSIFICATION REQUIRED BY THE FOURTEENTH AMENDMENT?

The State Court records before the Courts below in this case, together with the applicable provisions of Illinois law and usages, show that petitioner, along with more than 4,000 human derelicts annually from one Illinois county alone (Annual report, Circuit Court of Cook County, 1964, p. 9), was adjudicated a candidate for experi-

mental research honors, as an unconsenting subject, to benefit the public.

While Illinois has seen fit to abolish by legislative fiat a human guinea pig's right to consent, or refusal to consent (Ill. Rev. Stat., ch. 91½ § 6-3, 1963, A.) nowhere has she imposed any standards on the bizarre and exotic surgeries, brain implants, leucotomies (Projects 1705, 1707, 1730, The First Five Years, 1957-1962, Illinois Psychiatric Training and Research Authority) to which any person "found" in Illinois may be subjected, any more than she has established any precise standards for the classification, selection, and adjudication of persons including petitioner as experimental material under coercion.

While Illinois places the same disabilities and stigma on persons once committed to her "mental" institutions that she places on those committed to penal institutions (Ill. Rev. Stat., ch. 16½ § 34(d), 1963), at the same time she refuses to let those who have been committed to her penitentiaries be subjected to "treatment" of "shock", or "surgery" without their consent (Ill. Rev. Stat., ch. 108 § 122, 1963, A. 41) either as punishment, treatment, or to benefit society.

At the very least the Equal Protection Clause of the Fourteenth Amendment demands that petitioner along with the thousands of assorted paupers, vagrants, senile delinquents, who are processed annually under the Illinois Mental Health Code (Ill. Rev. Stat., ch. 91½ 1963) be classified according to some rational, precise standards before being stripped of liberty, property and even life itself, because of asserted non-conforming behavior.

The glossary of labels which Illinois has used to classify persons as "lunatic", "idiot", "insane", "demented", "men-

tally ill", "in need of mental treatment", and others does not provide a standard of distinction or classification with any medical or scientific precision much less legal significance.

Nor can unexplained medical labels (*Carter* v. *United States,* (CA DC) 252 F 2d 608, 617), nor medical syndrome labels (Becker, Ph. D, Revolution in Psychiatry, New York, 1964, p 6), nor a mental-medical mumbo-jumbo (Smith, Ph. D., 20 Journal American Psychological Association 911, November 1965) which have erected a Tower of Babel in the otherwise precise science of medicine (Weiner, M.D., in Schizophrenia (Bellak, M.D., ed) New York, 1958 p 110; Editorial, 9 Canadian Psychiatric Association Journal 367, 1964; Pleune, M.D., 46 International Journal of Psychoanalysis 358, 1965; Editorial, xviii American Journal of Psychotherapy 186, 1964; Bromberg, M.D., The Mind of Man, New York, 1959, pp 264-270; Rosenwald, Ph. D., Psychiatry, 1963, pp. 233-240) supplant words whose meaning has deep roots in the precise science of law. *Jordan* v. *DeGeorge,* 341 US 223, 227, 95 L ed. 886, 890, 71 S Ct 703.

A grabbag of phrases without any roots in the law: "psychopathic personality" (*Boutilier* v. *Immigration Service,* 387 US 118, 18 L ed 2d 661, 666, 87 S Ct 1563), "Mongrel breed" (*Loving* v. *Virginia,* US , 18 L ed 2d 1010, 1015, 87 S Ct 1817), "schizophrenic", "dementia praecox", "low-grade moron" (*Galloway* v. *United States,* 319 US 372, 386, 63 S Ct 1077, 1085, 87 L ed 1458), "moral pestilence" (*Edwards* v. *California,* 314 US 160, 176, 86 L ed 119, 62 S Ct 164, 168), "chronic addict" (*Robinson* v. *California,* 370 US 660, 665, 8 L ed 2d 758, 762, 82 S Ct 1417), or "delinquent" (Re Gault,

387 US 1, 18 L ed 2d 527, 87 S Ct 1528), if they are "legal terms of art" (*Boutilier* v. *Immigration Service,* (CA 2) 363 F 2d 488, 493) they have no scientific or medical value (Karl Menninger, M.D., Saturday Evening Post, April 25, 1964, p 12; Szasz, M.D., Law, Liberty and Psychiatry, New York, 1963; Blaustein, M.D., in Schizophrenia (Bellak, M.D., ed), New York, 1958; Kiev, M.D., 9 Canadian Psychiatric Association Journal 114, 1964; Norman, Ph. D., 27 Journal Consulting Psychology 40, 1963) and do not satisfy the criteria necessary to overcome the 14th Amendment's proscription against irrational, invidious or arbitrary classifications and distinctions when State action invades basic personal rights. *Skinner* v. *Oklahoma,* 316 US 535, 86 L ed 1655, 62 S Ct 1110; *Edwards* v. *California,* 314 US 160, 86 L ed 119, 62 S Ct 164; *Robinson* v. *California,* 370 US 660, 8 L ed 2d 758, 82 S Ct 1417.

The "void for vagueness" doctrine, where state action strips a person of his rights, is applicable to civil as well as criminal actions. *Small Co.,* v. *Am. Sugar Ref. Co.,* 267 US 233, 239; 69 L ed 589, 592, 45 S Ct 295; *Boutilier* v. *Immigration Service,* 387 US 118, 18 L ed 2d 661, 666, 87 S Ct 1563.

At one time in Illinois horses (as property) were entitled to a more realistic verification of their asserted disease (*Pearson* v. *Zehr,* 29 NE 854, 138 Ill. 48, 32 Am St Rep 113, 1891) than are human beings today; and State officials were held liable in exemplary damages to the de-horsed owner without reference to the Fourteenth Amendment or Civil Rights legislation.

II.

IN TAKING A PERSON'S PROPERTY AND LIBERTY, HOW FAR CAN STATE ACTION GO IN PURSUIT OF A VALID STATE INTEREST BEFORE TOLLING THE INDIVIDUAL'S CONSTITUTIONAL DEFENSES UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

The State Court proceedings before the Courts below in this case which relieved petitioner of his property, liberty and domain over his body were denominated "civil" proceedings and were conducted by a tribunal which proceeded contrary to the express statutory authority creating its jurisdiction and without its authority having been properly invoked. The accused (petitioner) had no counsel, before or during the proceedings; nor any intelligent waiver. There was no evidence, documentary, testimonial or demonstrative adduced in the proceedings; nor confrontation of any witnesses. No fact-finding process, inquisitorial, accusatorial or divine was invoked and none of the incidents, procedural or substantive, of a fair trial appear. (R. 22-43, A. 19-26).

As the complaint alleged (R11, A9, 10) and as respondents have admitted as true in their motions to dismiss, Illinois law (Ill. Rev. Stat., ch 91½, § 2-2) gave the respondent Adesko no judicial jurisdiction over the subject matter of petitioner's mental condition while petitioner was then in the custody and under the jurisdiction of another court charged with a criminal offense (R. 19, 21; A. 17, 18).

Nor could the respondents, had they been otherwise clothed with jurisdiction, have proceeded against petitioner on the allegations of the document labeled "Peti-

tion for Commitment" (R. 43, A. 27) which are inadequate to give an Illinois court jurisdiction over an abandoned cemetery lot (Ill. Rev. Stat., ch 21 § 21.3, 1963).

Regardless of whether a governmental process be denominated "civil" or "criminal", where the personal domain is invaded the Constitution describes an individual's perimeter of defense. *Boyd* v. *United States,* 116 US 616, 29 L. ed 746, 6 S Ct 524; Ex Parte Young, 209 US 123, 156, 52 L ed 714, 727, 28 S Ct 441; *One Plymouth Sedan* v. *Pennsylvania,* 380 US 693, 696, 14 L ed 2d 170, 172, 85 S Ct 1246; *Carroll* v. *United States,* 267 US 132, 147, 69 L ed 543, 549, 45 S Ct 280; *Mapp* v. *Ohio,* 367 US 643, 656, 6 L ed 2d 1081, 1090, 81 S Ct 1684, 84 ALR 2d 933.

And the mere label "civil" or "criminal" action does not delimit the procedural safeguards to which a person is entitled. *Smith* v. *Bennett,* 365 US 708, 6 L ed 2d 39, 81 S Ct 895; *People* v. *Olmstead,* 32 Ill. 2d 306, 205 NE 2d 625; *Klapprott* v. *United States,* 335 US 601, 616-619, 69 S Ct 384, 391-392, 93 L ed 1280.

But irrespective of whether the governmental process against a person is invoked under benevolent auspices (*Kent* v. *United States,* 383 US 541, 16 L ed 2d 84, 86 S Ct 1045) *Robinson* v. *California,* 370 US 660, 8 L ed 2d 758, 82 S Ct 1417 a State is required to tailor carefully the means of satisfying a legitimate state interest when fundamental liberties are at stake. *Katzenbach* v. *Morgan,* 384 US 641, 654 note 15, 16 L ed 2d 828, 838, 86 S Ct 1717; *Carrington* v. *Rash,* 380 US 89, 96, 13 L ed 2d 675, 680, 85 S Ct 775; *Harper* v. *Virginia Board*

of Elections, 383 US 663, 670, 16 L ed 2d 169, 175, 86 S Ct 1079; *Thomas* v. *Collins,* 323 US 516, 529-530, 89 L ed 430, 439, 440, 65 S Ct 315; *Thornhill* v. *Alabama,* 310 US 88, 95-96, 84 L ed 1093, 1098, 60 S Ct 736; *United States* v. *Carolene Products Co.,* 304 US 144, 152-153, note 4, 82 L ed 1234, 1241-1242, 58 S Ct 778; *Meyer* v. *Nebraska,* 262 US 390, 67 L ed 1042, 43 S Ct 625, 29 ALR 1446.

Under the 14th Amendment guarantees of personal liberty it is the accusatorial rather than the inquisitorial process that sets out the first pickets of defense against state action. *Griffin* v *California,* 380 US 609, 616, 14 L ed 2d 106, 110, 85 S Ct 1229; Re Groban, 352 US 330, 351-353 (Warren, C.J., Black, Douglas, Brennan, J.J., dissenting opinion), 1 L ed 2d 376, 77 S Ct 510, 523; Re Oliver, 333 US 257, 273, 68 S Ct 499, 507, 92 L ed 682; *Watts* v. *Indiana,* 338 US 49, 54, 69 S Ct 1347, 1350, 93 L ed 1801; *Reck* v. *Pate,* 367 US 433, 446-448, 6 L ed 2d 948, 957-958, 81 S Ct 1541.

In addition to a regularly constituted tribunal, its jurisdiction properly invoked (*Galpin* v. *Page,* (US) 18 Wall 350, 21 L ed 959); *Kenney* v. *Greer,* 13 Ill. 432; *Mamer* v. *Morrison,* 35 Ill. 2d 133, 219 NE 2d 524), the accusatorial process includes such rudimentary elements of defense as trial, immunity against self-incrimination, confrontation of accusers and right to counsel (*Kent* v. *United States,* 383 US 541, 555, 16 L ed 2d 84, 94, 86 S Ct 1045 *Re Gault,* 387 US 1, 18 L ed 2d 527, 87 S Ct 1528) as well as the venerable requirements of notice (*Armstrong* v. *Manzo,* 380 US 545, 549, 14 L ed 2d 62, 65, 85 S Ct 1187, *Eddy* v. *The People,* 15 Ill. 386 *Re Gault,* 387 US 1, 18 L ed 2d 527, 87 S Ct 1528) before State judicial action can have validity.

The doctrine of parens patriae, subsumed from murky Civil Law antecedents without "constitutional domestication" (*Re Gault,* 387 US 1, 18 L ed 2d 527, 540, 87 S Ct 1528; *Kent* v. *United States,* 383 US 541, 16 L ed 2d 84, 86, 86 S Ct 1045) is not a fair substitute for a due fact-finding process in discovering the truth under the adversary system; and the infirmities of a State "trial" absent constitutional guarantees are not cured by the rhetorical euphemisms, "treatment", (for punishment) or "receiving home" (for incarcerating institution) or the label "Clinical" attached to the proceedings. *Re Gault,* 18 L ed 2d at 539; Goffman, Asylums, New York, 1961 p 369.

As long as a due process trial requires some evidence (*Thompson* v. *Louisville,* 362 US 199, 4 L ed 2d, 654, 80 S Ct 624, 80 ALR 2d 1355) and medical inference testimony is not evidence (*Galloway* v. *United States,* 319 US 372, 386, 63 S Ct 1077, 1085, 87 L ed 1458) without probing the basis of experts' conclusions (*Rollerson* v. *United States,* (CA DC) 343 F 2d 269, 272) then the precise and discriminating exactions of due process (*Schlagenhauf* v. *Holder,* 379 US 104, 127, 13 L ed 2d 152, 169; 85 S Ct 234) are not met by substituting "clinical" shotgun procedures (Smith, Ph. D., 20 Journal American Psychological Association 911, November 1965) which have no scientific reliability or validity. Taft and England, Criminology, 4th ed, New York, 1964, p 309 48 Ia. L Rev 59, 1962, Liefer, 19 American Psychologist 825, 1964.

If Congress has seen fit to restrain, under penalty, the excesses of scientific research on the Nation's dogs and cats (Title 7 USCA §§ 2131 ff., PL 89-544, 80 Stat 350) along with monkeys guinea pigs, hamsters and rabbits (Sen Rep No. 1281, 89th Cong 2nd Sess, U S

Code and Ad News, p 2635), the Federal Courts in our era of enlightment should correct a state court's deficient fact-finding process where federal human rights are infringed. *Townsend* v. *Sain,* 372 US 293, 9 L ed 2d 770, 83 S Ct 745; *Greenwood* v. *Peacock,* 384 US 808, 829, 16 L ed 2d 944, 958, 86 S Ct 1800.

III.

IS PETITIONER, UNDER THE ADMITTED FACTS IN THIS CASE, ENTITLED TO BE HEARD FAIRLY AND IMPARTIALLY ON THE MERITS OF HIS CLAIM IN A FEDERAL COURT WITHOUT REGARD TO HIS FINANCIAL STATUS?

The only hearing which the District Court granted on the merits of the claim in this case was briefly entertained on September, 19, 1966, (R391-393), when Judge Decker to whom the case had been regularly assigned on July 27, 1966, denied petitioner's motion (R276) to vacate the order of Judge Perry dismissing the complaint (R 273) entered from chambers without hearing or argument on September 9, 1966 after taking the case as recess judge on motion of several of the respondents made on August 17, 1966. (R366-378).

A judgment on the merits rendered by a federal District Court from chambers without hearing and without argument on the merits of a constitutional claim is in derogation of the power and authority of the Court to impartially hear and determine the cause (*Overby* v. *Gordon,* 177 US 214, 44 L ed 741, 20 S Ct 603; *Re Reed,* 100 US 13, 25 L ed 538; *Simmons* v. *Saul,* 138 US 439, 34 L ed 1054, 11 S Ct 369); and a Court's decision rendered without hearing is a mere arbiting edict (*Windsor* v. *McVeigh,* 93 US 274, 23 L ed 914) where a Federal

judge's oath (Title 28 USCA § 453) and office requires that constitutionally protected rights be given judicial protection, if binding on judges of the Supreme Court (*Reynolds* v. *Sims,* 377 US 533, 566, 12 L ed 2d 506, 530, 84 S Ct 1362) binds District judges as well.

The opportunity, as a matter of right in the Federal Courts (Title 28 USCA § 1654), to be heard fairly and impartially is denied when a litigant is faced in his first appearance for hearing and argument before one judge with the task of overcoming an adverse decision previously entered by another judge without hearing or argument. *Armstrong* v. *Manzo,* 380 US 545, 551, 14 L ed 2d 62, 66, 85 S Ct 1187.

When the outcome is decided by imposing an inequitable burden of proof (*Speiser* v. *Randall,* 357 US 513, 525, 2 L ed 2d 1460, 1472, 78 S Ct 1332) where the opportunity to be heard is a fundamental requirement of due process (*Grannis* v. *Ordean,* 234 US 385, 394, 58 L ed 1363, 1369, 34 S Ct 779) the right could have been accorded by granting a motion to vacate and consider the case anew *Armstrong* v. *Manzo,* 380 US 545 at 553, 14 L ed 2d 62 at 66.

A civil action in the Federal Courts, provided for by Congress (Title 28 USCA § 1343, Title 42 USCA §§ 1983, 1985) is an appropriate method to enforce Federal rights against state action either by vindicating injury to person and property (*Monroe* v. *Pape,* 365 US 167, 5 L ed 2d 492, 81 S Ct 473; *Greenwood* v. *Peacock,* 384 US 808, 829, 16 L ed 2d 944, 958, 86 S Ct 1800) or by inhibiting threats to constitutional guarantees (*Dombrowski* v. *Pfister,* 380 US 479, 14 L ed 2d 22, 85 S Ct 1116) for what the Constitution has conferred neither the Congress, nor the Executive, nor the Judiciary nor all

three in concert may strip away (*Nishikawa* v. *Dulles*, 356 US 129, 138 (concurring opinion), 2 L ed 2d 659, 666, 78 S Ct 612) any more than state governments—and every branch of them, executive, legislative and judicial —where any individual, however, lowly and unfortunate, asserts a legal claim (*Caritativo* v. *California*, 357 US 549, 558 (Frankfurter, Douglas, Brennan, JJ, dissenting opinion), 2 L ed 2d 1531, 1538, 78 S Ct 1263).

IV.

IS THIS COURT'S INTERPRETATION AND CONSTRUCTION OF AN ACT OF CONGRESS BINDING ON THE LOWER FEDERAL COURTS, AND DO THE RECORDS OF A FEDERAL COURT IMPORT ABSOLUTE VERITY?

(a)

The Court of Appeals in dismissing the appeal in this case cited as authority its prior holding in a case decided in June, 1965. (A. 42). The complaint in this case was filed in July, 1966 following a unanimous decision of this Court in March, 1966, (*United States* v. *Price*, 383 US 787, 16 L ed 2d 267, 86 S Ct 1152) which construed the phrase "under color of law" as used by Congress in the pertinent statute in a manner contrary to that relied on by the Court of Appeals in its prior Holding (*Byrne* v. *Kysar*, (CA7) 347 F 2d 734, June 1965).

While petitioner believes that this Court's holding in a recent case where the Court of Appeals judgment sustaining the District Court's dismissal for failure to state a claim under § 1983 was reversed by this Court to conform with the decisions in the other circuits there cited (*Cooper* v. *Pate*, 378 US 546, 12 L ed 2d 1030, 84 S Ct 1733 (1964) could be dispositive of the issues raised in this petition—and despite the respondents' technical

objections raised against the inartificiality of the complaint (*Radovich* v. *National Football League,* 352 US 445, 453, 1 L ed 2d 456, 462, 77 S Ct 390)—petitioner treats the issues as they are presented by the complaint and taken as true, as they must be, on motions to dismiss.

Against the contentions of respondents and as noted by the Court below (A. 36) that *Byrne* v. *Kysar,* 347 F2d 734, 7 cir (1965) is authority for the dismissal of the complaint here, petitioner relies on this Court's plain exposition of the conditions under which a prior decision can operate as a bar to another suit in the same or related cause. (*Costello* v. *United States,* 365 US 265, 286, 5 L ed 2d 551, 565, 81 S Ct 534). And where (as in *Byrne* v. *Kysar,* 347 F2d 734, 7 cir, appendix to record p 39) the District Court had dismissed the claim for want of jurisdiction there was no consideration of or adjudication on the merits of the claim (*Baker* v. *Carr,* 369 US 186, 199, 7 L ed 2d 663, 675, 82 S Ct 691) which could operate as a bar to subsequent proceedings.

Even where, arguendo, the prior judgment is an adjudication on the merits of the present claim there is no bar to a subsequent suit when, between the time of the first decision and the second, there has been a controlling intervening decision on the points at issue contra the first holding. *State Farm Mut. Auto. Ins. Co.* v. *Duel,* 324 US 154, 89 L ed 812, 65 S Ct 573; 2 Freeman on Judgments (5th ed 1925) § 713; *Blair* v. *Commissioner,* 300 US 5, 9, 57 S Ct 330, 332, 81 L ed 465; *West Coast Life Ins. Co.,* v. *Merced Irr. Dist.,* (CA 9) 114 F2d 654, 662; *Murchard* v. *Berenson,* (CA 5) 307 F 2d 368.

The holding of *Byrne* v. *Kysar,* 347 F 2d 734 as to what constitutes State action "under color of law" was rendered in June, 1965. In March, 1966 this Court con-

strued and interpreted the phrase as used by Congress in the Civil Rights Acts (Title 42 USC § 1983) in its decision in *United States* v. *Price,* 383 US 787, 794, 16 L ed 2d 267, 272, 86 S Ct 1152 in the light of which the adequacy of complaint herein filed in July 1966 should have been determined although the Courts below refused to entertain any hearing or argument thereon.

Contrary to the holding in *Byrne* v. *Kysar,* 347 F2d 734, this Court has held in *United States* v. *Price,* that "To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willing participant in joint activity with the State or its agents.' 'Under color' of law means the same thing of § 242 that it does in the civil counterpart to § 242, 42 USC § 1983 (1964 ed)," 383 US at 794, 16 L ed 2d at 272.

Nor is there any authority in *Byrne* v. *Kysar,* 347 F 2d 734, for the contention that judicial immunity from civil damage actions extends to persons acting without judicial jurisdiction in line with established precedents extending from *Bradley* v. *Fisher,* (US) 13 Wall 335, 20 L ed 646; *Thomas* v. *Hinsdale,* 78 Ill. 259 (1875); *Shadbolt* v. *Bronson,* 1. Mich 85 (1848); *Bieglow* v. *Stearns,* 19 Johns 39 (NY); (1820) to this Court's opinion last term in *Pierson* v. *Ray,* 386 US 547, 18 L ed 2d 288, 87 S Ct.

Or for the silly notion somewhere suggested, that lawyers are immune from liability, either before the Force Acts of 1866-1870; *Burnap* v. *Marsh,* 13 Ill. 536 (1852) or now, *Dombrowski* v. *Eastland,* 387 US 82, 18 L ed 2d 577, 87 S Ct 1425 (1967).

(b)

The record of a Federal District Court which does not speak the truth, and on its face shows that, speak-

ing falsely, it cannot import verity abrogates the traditional requirements of Federal courts for the preservation of the integrity of their records. *Evans* v. *Stettnisch,* 149 US 605, 37 L ed 866, 13 S Ct 931; *Chapman & D. Lumber Co* v. *Board of Directors St. Francis Levee Dist.,* 234 US 667, 58 L ed 1526, 34 S Ct 906; C.J.S., Courts, §§ 230, 237; Judgments, § 132; App & Err, § 1143; Am. Jur. 2d, Courts, §§ 26, 36; App & Err, §§ 486, 493.

A recital in the Court's judgment that "each and every defendant has moved to dismiss the complaint" and finding "each of the motions well taken" and ordering the complaint dismissed "as to each and every defendant named therein" (R 273) which is supported in the record only by a false affidavit of filing and service (R. 259, 260) and is controverted in the record by the clerk's docket entries and a contradictory affidavit of service (R. 257) defeats the otherwise invincible presumptions of the law that the Court acted impartially and honestly (*Crescent City L.S.L. & S.H. Co.* v. *Butcher's Union S.H. & L.S.L. Co.,* 120 US 141, 30 L ed 614, 7 S Ct 472), justly after due consideration (*Livingston* v. *Moore,* (US) 7 Pet 469, 8 L ed 751), for good reason and correctly (*Robinson* v. *Fair,* 128 US 53, 32 L ed 415, 9 S Ct 30), in conformity to law (*Shreveport* v. *Cole,* 129 US 36, 32 L ed 589, 9 S Ct 210), and in accordance with its duty (*Jennings* v. *Carson,* (US) 4 Cranch 2, 2 L ed 531); that the proceedings were regular (*Dallas County* v. *McKenzie,* 110 US 686, 28 L ed 285, 4 S Ct 184) in conformity with settled usage (*Williams* v. *United States,* (US) 1 How 290, 11 L ed 135) sufficient to support the judgment (*Florentine* v. *Barton,* (US) 2 Wall 210, 17 L ed 783) except where controverted by the record (*Ensminger* v. *Powers,* 108 US 292, 27 L ed 732, 2 S Ct 643). The integrity and value of the judi-

cial system as an institution for the administration of public and private justice rest largely upon this wholesome principle. Crescent City, etc., 120 US at 160.

If the punctilio of observance demanded in an earlier era has been eroded by contemporary standards, nonetheless court records still have a function to perform which has not been dispensed with (*Standard Vacuum Oil Co.* v. *United States,* 339 US 157, 160, 70 S Ct 545, 547, 94 L ed 731) and the plain words of a court's judgment roll is the only sentence recognized by the law. *Greene* v. *United States,* 358 US 326, 329, 3 L ed 2d 340, 342, 79 S Ct 340.

The duty of an attorney to the court and to assist in the administration of justice is not fulfilled by filing false and fraudulent affidavits of service (*Hertz* v. *United States,* (1927, CA 8) 18 F2d 52) which prejudice the rights of a party; and destroy the integrity of a court's record; and the conduct is subject to censure. *Temple* v. *United States,* cert. den. 386 US 961, 349 F2d 116 (1965), 18 L ed 2d 110.

CONCLUSION

The State Court proceedings before the Courts below in this case sufficiently state a claim against the respondents, despite the inelegant draftsmanship of the complaint, to entitle petitioner to a fair and impartial hearing on the merits before a court adequately apprised of properly discovered relevant facts.

/s/ Paul V. Byrne, Jr.
PAUL V. BYRNE, JR., *Petitioner*
Rm 1540, 10 South LaSalle Street
Chicago, 60603, Illinois

APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
Thursday, June 8, 1967

Before

Hon. JOHN S. HASTINGS, *Chief Judge*

Hon. LATHAM CASTLE, *Circuit Judge*

Hon. ROGER J. KILEY, *Circuit Judge*

PAUL V. BYRNE, JR.,
Plaintiff-Appellant,

No. 15943 vs.

CHICAGO TITLE AND TRUST COMPANY, etc., etal.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Hereby Ordered by the Court that the motion of plaintiff-appellant to reconsider and redetermine defendants-appellees' motion to dismiss this appeal be, and the same is hereby denied.

It Is Further Ordered That the motion of defendants-appellees to strike the aforesaid motion of plaintiff-appellant be, and the same is hereby denied.

(Slip Opinion)

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

SEPTEMBER TERM, 1964 - APRIL SESSION, 1965

No. 14911

PAUL V. BYRNE, JR.,
Plaintiff-Appellant,
v.
JOHN KYSAR, ALFRED L. FEIN, STANLEY J. IMBIORSKI, FRANCIS E. SCHLAX and CHARLES I. BARISH,
Defendants-Appellees.

Appeal from the United States District Court, Northern District of Illinois, Eastern Division.

JUNE 22, 1965

Before CASTLE and KILEY, *Circuit Judges,* and GRANT, *District Judge.*

CASTLE, *Circuit Judge.* Plaintiff-Appellant, Paul V. Byrne, Jr., prosecutes this appeal from an order of the District Court denying his motion for leave to file an amended complaint. * * * The claim was predicated on 42 U.S.C.A. § 1983 * * *

* * * Dr. Kysar acted in his capacity of private physician, although in the employ of an instrumentality of the City of Chicago, and not under color of law within the meaning of § 1983 * * * Defendant Schlax's participation in the proceeding as a private lawyer did not make him a state functionary acting under color of law * * * Barish * * * acted * * * as a private citizen * * *"

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 4 1967
JOHN F. DAVIS, CLERK

No. 692

In the

Supreme Court of the United States

OCTOBER TERM, 1967

PAUL V. BYRNE, JR.,

Petitioner,

vs.

CHICAGO TITLE AND TRUST COMPANY, individually and as trustee of trust agreements No. 42212 and No. 44999; THE CATHOLIC BISHOP OF CHICAGO, a corporation sole; THE FIRST NATIONAL BANK OF CHICAGO, individually and as trustee of trust agreement No. 51296-6; ROGERS, PAUL and HANSEN; QUINN, JACOBS, BARRY, and LATCHFORD; QUINN, JACOBS and BARRY; JOHN B. HENDRICKS; FRANCIS E. SCHLAX; ROBERT V. HOGAN; FRANK A. KARABA; DON W. FEELEY; KIRK L. MacKINNON; GEORGE A. HANSEN; VLADMIR G. URSE, LORETTO TENNES, individually and as trustee of the Thomas Byrne Estate Liquidation trust; ALBERT BUCKLEY; DONALD MASTERSON; NORA CAMPION; THADDEUS ADESKO; and ROBERT L. HUNTER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SEVENTH CIRCUIT

FRANK L. PAUL
GEORGE A. HANSEN
38 South Dearborn Street
Chicago, Illinois
Attorneys for Respondents,
The First National Bank of Chicago,
Rogers, Paul and Hansen,
Don W. Feeley and
George A. Hansen

The Scheffer Press, Inc.—ANdover 3-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 692

PAUL V. BYRNE, JR.,

Petitioner,

vs.

CHICAGO TITLE AND TRUST COMPANY, individually and as trustee of trust agreements No. 42212 and No. 44999; THE CATHOLIC BISHOP OF CHICAGO, a corporation sole; THE FIRST NATIONAL BANK OF CHICAGO, individually and as trustee of trust agreement No. 51296-6; ROGERS, PAUL and HANSEN; QUINN, JACOBS, BARRY, and LATCHFORD; QUINN, JACOBS and BARRY; JOHN B. HENDRICKS; FRANCIS E. SCHLAX; ROBERT V. HOGAN; FRANK A. KARABA; DON W. FEELEY; KIRK L. MacKINNON; GEORGE A. HANSEN; VLADMIR G. URSE, LORETTO TENNES, individually and as trustee of the Thomas Byrne Estate Liquidation trust; ALBERT BUCKLEY; DONALD MASTERSON; NORA CAMPION; THADDEUS ADESKO; and ROBERT L. HUNTER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SEVENTH CIRCUIT

ARGUMENT

Petitioner in his "Statement of the Case" states the following concerning The First National Bank of Chicago:

> "The remnants of petitioner's estate including a $24,000.90 inheritance over which respondent First National Bank took control on April 20, 1964, in a fiduciary capacity (R. 14, 15, A. 12, 13), were readily gathered and sequestered by the various respondents participating in concert in subsequent civil proceed-

ings (R. 44-69, A. 29-31) between June 1963 and October 1965."

Presumably this applies to attorneys Don W. Feeley, George A. Hansen and to Rogers, Paul and Hansen (the name under which they practice) as they represented The First National Bank of Chicago in the proceedings referred to by Petitioner and are named as defendants in this proceeding.

The cases cited by Petitioner have no application to any facts concerning the participation of The First National Bank of Chicago, Don W. Feeley, George A. Hansen or Rogers, Paul and Hansen in the various proceedings referred to by Petitioner.

These Respondents' first appearance in an action involving Petitioner was on May 7, 1964 when The First National Bank of Chicago (hereinafter sometimes referred to as the "Bank") was served with a Petition in "Jean Byrne vs. Paul V. Byrne, Jr." Circuit Court of Cook County, State of Illinois, Case No. 63 C 8551 setting forth, among other things, that the Bank be restrained and enjoined from paying to Petitioner any monies, certificates of stock or credit by reason of any beneficial interest possessed by Petitioner under or by virtue of a certain trust.

The Bank was trustee of a certain trust, under which trust Ella Daly Byrne, the mother of Petitioner, was a life beneficiary. The assets of the trust were distributable upon her death to her children. Ella Daly Byrne died on April 20, 1964. The applicable provision of the trust in respect to this distribution is as follows:

"3. If ELLA DALY BYRNE shall survive me, the Trustee shall set aside out of the principal of Trust

'C' the sum of One Hundred Thousand Dollars ($100,000.00). The Trustee shall pay from the income and principal of said sum (using income first to the extent available) the sum of Five Hundred Dollars ($500.00) per month to ELLA DALY BYRNE so long as she shall live, or until the principal sum shall be exhausted, whichever shall first occur. Upon the death of ELLA DALY BYRNE after my death, the Trustee shall distribute said principal fund in equal shares to the then living lawful descendants, *per stirpes*, of ELLA DALY BYRNE."

The Bank contacted the five descendants who were the beneficiaries of the trust, one of whom lived in California, regarding the distribution of that part of the trust which was invested in securities. Upon approval of the stock plan of distribution by the five beneficiaries, the Bank proceeded to have the various securities transferred into their respective names.

On April 22, 1964, two days after the death of the life beneficiary, the Bank made distribution of $200.00 to Petitioner from the assets of the trust; on April 23, 1964 a further distribution was made by the Bank to Petitioner of the sum of $4,000.00 from the assets of the trust; and on May 8, 1964 the Bank distributed to Petitioner certain securities which had been transferred to Petitioner's name from the assets of the trust. The shares of stock that remained on May 8, 1964 for distribution to Petitioner were the following:

26 shares General Electric Co. common stock

31 shares United States Steel Corp. common stock

50 shares Texaco, Inc. capital stock

18 shares General Motors Corp. common stock

which on May 8, 1964 had not been returned from these companies or their Transfer Agents for delivery to Petitioner. These securities had a market value of approximately $9,396.00 on May 8, 1964.

On or about June 6, 1963, Jean Byrne filed an action against Petitioner in the Circuit Court of Cook County, State of Illinois entitled "Jean Byrne v. Paul V. Byrne, Jr.", Circuit Court Case No. 63 C 8551 for separate maintenance. A decree of separate maintenance was entered in said proceeding on November 22, 1963 providing for Plaintiff's support and maintenance and for the support and maintenance of those of their nine children who were minors at that time. On May 7, 1964 the Bank was served with a Petition in that proceeding as hereinabove stated that it be restrained and enjoined from paying to Plaintiff any monies, certificates of stock or credit by reason of any beneficial interest possessed by Petitioner under or by virtue of the aforesaid trust. Thereafter orders were entered by the court in the Circuit Court proceedings on May 11, 1964, May 13, 1964 and July 7, 1964 restraining or enjoining the Bank from transferring or releasing assets from the aforesaid trust to Petitioner. The Bank was not made a party defendant to the Circuit Court proceedings, but the aforesaid Petition and the Orders of May 11, May 13, and July 7, 1964 were served upon the Bank.

On October 8, 1965 the court entered the following Order in the Circuit Court proceeding:

"ORDER

"THIS CAUSE COMING ON FOR HEARING on the Motion of the defendant, PAUL V. BYRNE, JR., to vacate and dissolve the injunctive orders entered by this Court on May 11, 1964, and May 13, 1964, and

for other proceedings consistent with the opinion of the Appellate Court of Illinois, First District, First Division, in the appeal from such injunctive orders by the defendant, PAUL V. BYRNE, JR., to such Court, the parties hereto appearing in open court in person and by their respective counsel, and it appearing that:

"THE FIRST NATIONAL BANK OF CHICAGO presently holds, as Trustee under Trust known as Trust No. T-W 51296-6, assets for distribution to defendant, PAUL V. BYRNE, JR., having a present market value of approximately $11,900.00.

"IT IS HEREBY ORDERED AND DECREED:

"1. The said injunctive orders of May 11, 1964, and May 13, 1964, are hereby vacated, dissolved and set aside.

"2. THE FIRST NATIONAL BANK OF CHICAGO, as Trustee under Trust No. T-W 51296-6, is authorized and directed to deliver forthwith to HARRY BOOTH, as attorney and agent for PAUL V. BYRNE, JR., defendant herein, the assets described in Exhibit "A" attached hereto and made a part hereof.

"3. Upon receipt of said assets from said trust, HARRY BOOTH, as attorney and agent for PAUL V. BYRNE, JR., defendant, shall forthwith cause said assets to be sold in accordance with the agreement of the parties hereto and shall distribute the proceeds thereof as follows:

"(a) $2,400.00 to JEAN C. BYRNE, plaintiff, on condition that such funds shall be used for the support of herself and her minor children, said amount being in full payment of monies due her to November 1, 1965, under all support and maintenance orders of this Court heretofore entered herein.

"(b) $3,600.00 to DAVID J. BARRY, law partner of the attorney for the plaintiff, on condition such sum shall be deposited and held by DAVID J. BARRY in trust for JEAN C. BYRNE, the plaintiff herein, and shall be distributed by him to her in monthly installments of $300.00 each, commencing with November 1, 1965, to be used solely for her support and the support of her minor children, pursuant to the order of this Court entered on November 4, 1964.

"(c) $750.00 to FRANCIS E. SCHLAX, attorney for the plaintiff, in full satisfaction of all orders for attorney's fees heretofore entered in this matter.

"(d) $1,000.00 to THE FIRST NATIONAL BANK OF CHICAGO in payment for fees and expenses accrued to date in the handling of and distribution of the aforesaid assets of Trust No. T-W 51296-6.

"(e) $700.00 to JOHN HENDRICKS, judgment creditor of the defendant, PAUL V. BYRNE, JR., in full satisfaction and release of garnishment proceedings against THE FIRST NATIONAL BANK OF CHICAGO, pursuant to agreement and stipulation of said JOHN HENDRICKS to dismiss garnishment proceedings in 64 M1-510834.

"(f) The remainder to PAUL V. BYRNE, JR., the defendant herein.

"4. The order of this Court providing for the monthly payments of $300.00 from PAUL V. BYRNE, JR. to JEAN C. BYRNE shall be satisfied for the period ending October 31, 1966, and beginning with November 1, 1965, by the payment of the above sum of $3,600.00 to DAVID J. BARRY, as hereinabove

provided, as agent and trustee for the said JEAN C. BYRNE, plaintiff herein.

"5. The Court retains jurisdiction of this cause.

ENTER:

October 8, 1965 /s/ Robert L. Hunter
JUDGE

ORDER APPROVED:

/s/ Jean C. Byrne by F.E.Schlax
Plaintiff

/s/ Paul V. Byrne, Jr.,
Defendant

/s/ Francis E. Schlax
Attorney for Plaintiff

/s/ Harry R. Booth
Attorney for Defendant

"EXHIBIT 'A'

Securities held in Trust C under the Will of Walter S. Barnes, Trust No. T-W 51296-6, October 7, 1965

"26 shares General Electric Co. common stock
18 shares General Motors Corp. common stock
50 shares Texaco, Inc. capital stock
31 shares United States Steel Corp. common stock
$1,000 Commercial Credit Company Demand Note

(To be distributed by check)

Principal Cash	$364.89
Income Cash	$ 61.31"

which is attached as Exhibit "I" to Petitioner's Complaint in this proceeding. The Order not only bears the signature of Petitioner, but also of his then attorney, Harry R. Booth. No appeal was taken from said Order and no complaint is made that the Bank did not distribute the

remaining assets of the trust in accordance with said Order.

Mr. Booth is not a party plaintiff or defendant to the action before this Court.

On June 22, 1964 the Bank was served with summons and a Complaint in the matter entitled *"Paul V. Byrne, Jr.,* v. *The First National Bank of Chicago"*, Circuit Court of Cook County, State of Illinois, Case No. 64 CH 3589 wherein Petitioner prayed as follows:

> "Wherefore, the plaintiff prays that a decree of this Court be entered requiring the Bank to make such distribution without delay and also to pay the plaintiff such damages including attorney's fees as this Court may find plaintiff has incurred by reason of the Bank's failure to perform its fiduciary duty and for such further, different or other relief as to this Court may seem meet."

On motion of the Bank the Court on October 21, 1964 in that proceeding entered summary judgment in favor of the Bank. Petitioner filed a motion to vacate the Order granting summary judgment in favor of the Bank, which was denied. Petitioner appealed from this Order to the Appellate Court of Illinois, First District-Fourth Division.

Petitioner in his brief on appeal of that case stated in his "Nature of the Case" that he brought the suit as a "cestui que trust against the Defendant for breach of its fiduciary duty to the cestui in withholding the trust res in violation of the terms of the trust agreement and for dealing with adverse parties without advising or informing the cestui".

The Complaint in that case states Respondent was required to distribute the corpus of the trust to certain

beneficiaries upon the death of Ella Daly Byrne. No violation of any trust provision is set forth in the Complaint. There is no allegation the defendant exercised any trust powers not connected with the winding up and distribution of the trust. There is no allegation of facts in the Complaint in support of the phrase "and for dealing with adverse parties without advising or informing the cestui".

That action was essentially an action by Petitioner for alleged damages by reason of the Respondents not distributing to Petitioner prior to May 11, 1964 all of that part of the assets of the trust to which Petitioner was entitled upon death of his mother on April 20, 1964. The period involved was twenty-one days, of which fifteen were business days.

The Appellate Court affirmed the decision of the Circuit Court of Cook County in *"Byrne* v. *The First National Bank of Chicago"* 68 Ill. App. 2d 394 (Abs. decision February 4, 1966. Rehearing denied March 30, 1966) stating:

> "We find that there is no genuine issue as to any material fact and that the defendant did not breach any duty imposed upon it as trustee. A motion for summary judgment is properly granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Murphy* v. *Cory Pump & Supply Co.*, 47 Ill. App. 2d 382. Therefore, since the order granting the summary judgment was proper, the judgment of the Circuit Court is affirmed."

As far as these Respondents are concerned, Petitioner has been before (1) The Honorable Robert L. Hunter, Judge of the Circuit Court of Cook County, State of Illinois in the case entitled *"Byrne* v. *Byrne"*; (2) The

Honorable Cornelius Harrington, Judge of the Circuit Court of Cook County, State of Illinois in the case entitled *"Byrne* v. *The First National Bank of Chicago"*; (3) The Honorable Joseph J. Drucker, The Honorable Robert E. English and The Honorable John V. McCormack, Justices of the Appellate Court, Fourth Division, State of Illinois, in the Appeal of *"Byrne* v. *The First National Bank of Chicago"*; (4) The Honorable Joseph S. Perry, Judge of the United States District Court in this matter; (5) The Honorable Bernard M. Decker, Judge of the United States District Court on a Motion to Reconsider and Vacate the Order of Dismissal and a Motion for Leave to File an Amended Complaint in this matter; (6) The Honorable John S. Hastings, Chief Judge, The Honorable Latham Castle, Circuit Judge, The Honorable Roger J. Kiley, Circuit Judge, United States Court of Appeals on the Appeal of this matter and the Petitioner's Motion to Reconsider and Redetermine the Motion to Dismiss the Appeal.

The value of the securities that were to be delivered to Petitioner was approximately $9,396 on May 8, 1964. Petitioner in this action "demands judgment in the amount of 600 Thousand Dollars ($600,000) from the defendants jointly and severally".

CONCLUSION

Petitioner has not set forth any facts upon which to base a liability of the Respondent. He has had fair and impartial hearings. He and his attorney approved the order of distribution which involved the Respondent in this matter. Therefore the Petition to this court to issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

FRANK L. PAUL
GEORGE A. HANSEN
Attorneys for Respondents

APPENDIX

Opinion of the Appellate Court

50482
PAUL V. BYRNE, JR.,
Plaintiff-Appellant,
vs.
THE FIRST NATIONAL BANK OF CHICAGO,
Defendant-Appellee.

Appeal From Circuit Court of Cook County.

MR. PRESIDING JUSTICE DRUCKER DELIVERED THE OPINION OF THE COURT:

Plaintiff, as a cestui que trust, brought an action for damages against the defendant, as trustee, alleging that the defendant breached its fiduciary duty in withholding the trust res in violation of the terms of the trust agreement and in dealing with adverse parties without advising or informing the cestui. The trial court entered an order granting a summary judgment in favor of the defendant. Plaintiff appeals from the denial of his motion to vacate that order.

The undisputed facts as set forth in the pleadings and affidavits are as follows: Ella Byrne was a life beneficiary of a trust administered by the defendant, the assets of which were distributable upon her death to her children, one of whom is the plaintiff. She died on April 20, 1964. On April 22, 1964, defendant distributed $200 to the plaintiff from the assets of the trust and on April 23 plaintiff received an additional distribution of $4,000, leaving only the securities of the trust to be distributed. Defendant immediately contacted the five beneficiaries of the trust (one of whom resided in California) to determine whether the beneficiaries desired distribution of the shares of stock in kind or in cash. Upon approval by all the beneficiaries of the plan of distribution in kind defendant proceeded to have the various securities transferred into their respective

names. On May 8 certain securities which had been transferred to the plaintiff's name and returned to the defendant were distributed to him, and the only securities remaining in the trust on that date for distribution to the plaintiff were those which had not been returned to the defendant from the respective companies or their transfer agents.

In June 1963 Jean Byrne (plaintiff's wife) filed an action against the plaintiff herein for separate maintenance and a decree therefor was entered in November. On May 7, 1964, the defendant herein was served with a notice of motion and copy of a petition that plaintiff would request a court injunction restraining and enjoining it from paying or delivering to the plaintiff herein any monies, certificates of stock or credit by reason of any beneficial interest possessed by the plaintiff under or by virtue of the trust. Although plaintiff contends that he received no notice of this proceeding, the notice of motion served on defendant was addressed to both the defendant and Paul Byrne, Jr. The injunction order was entered by the court on May 11.[1] On May 13 another order was entered enjoining the defendant from delivering to Paul V. Byrne, Jr., any other property which it still had in its possession. The defendant complied with that court order though it was not made a party in the aforesaid proceeding.

Plaintiff contends that on the day after Ella Byrne's death the defendant "could have and should have" distributed the estate; that defendant "devised a scheme by which the distribution was made contingent on the whim of other beneficiaries, and by reason of these dilettante provisions of such scheme was not able to dis-

[1] When the securities were delivered to the plaintiff on May 8 the trust department of the bank had not been aware of the pending proceedings. On May 13 the court ordered Paul Byrne, Jr., to return to the trustee the securities delivered to him on May 8, but this order was rescinded by the order of July 7 which allowed him to retain those securities.

tribute until May 8, 1964, when it made partial distribution, but refused to make complete distribution." Plaintiff alleged no facts in his complaint to support these accusations. Plaintiff also contends that since a trustee has a duty to protect and defend the trust res and also to keep his cestui informed of all matters which might affect the value of the trust property, that therefore the defendant should have notified him of the proceeding and also should have intervened therein to inform the court that it was hindering distribution of the remaining trust property.

Trustees are bound in the management of all the matters of the trust to act in good faith and employ such vigilance, diligence and prudence which ordinary men would exercise under like circumstances in dealing with their own affairs. *Harris Trust and Savings Bank* v. *Wanner,* 393 Ill. 598. Upon termination of the trust the trustee has the power only to perform such acts as are necessary to the winding up of the trust and the distribution of the trust property. *Breen* v. *Breen,* 411 Ill. 206. By its express terms the trust in the instant case terminated at the death of Ella Byrne on April 20, 1964. When defendant's trust department received notices of the aforementioned petition and order, less than one month after the termination of the trust, the only trust assets remaining for distribution to the plaintiff were shares of stock which had not been returned from the respective companies or their transfer agents. Upon receipt of these securities the defendant was required to observe the aforesaid injunction although it was not a party to the proceeding. In *American Zinc Co.* v. *Vecera,* 338 Ill. App. 523, the court at page 530 stated that:

> All persons having notice of an injunction are required to observe it. (Citing cases.) A person who participates in acts prohibited by an injunction may be committed for contempt, although he is not a party to the litigation nor named in the order granting the injunction. (Citing cases.)

Though a trustee does have a duty to protect and defend the trust property (*Holyoke* v. *Continental Ill. Nat. Bank & Trust Co.*, 346 Ill. App. 284), the suit brought by Jean Byrne for separate maintenance was a personal action against Paul Byrne, Jr., and was not a direct attack on the trust property. Therefore the trustee was under no duty to intervene for any reason in that proceeding. Certainly the trial court was aware that it was delaying final distribution of the trust property since it issued the injunction. Moreover, since the aforesaid action was personal against Paul Byrne, Jr., only the plaintiff in that proceeding was required to give notice thereof to him and no such duty devolved upon the trustee.

We find that there is no genuine issue as to any material fact and that the defendant did not breach any duty imposed upon it as trustee. A motion for summary judgment is properly granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Murphy* v. *Cory Pump & Supply Co.*, 47 Ill. App. 2d 382. Therefore, since the order granting the summary judgment was proper, the judgment of the Circuit Court is affirmed.

AFFIRMED.

ENGLISH and MCCORMICK, *J.J.*, concur.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 6 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 692

PAUL V. BYRNE, JR.,

Petitioner,

vs.

CHICAGO TITLE AND TRUST COMPANY, INDIVIDUALLY AND AS TRUSTEE OF TRUST AGREEMENTS No. 42212 AND No. 44999; THE CATHOLIC BISHOP OF CHICAGO, A CORPORATION SOLE; THE FIRST NATIONAL BANK OF CHICAGO, INDIVIDUALLY AND AS TRUSTEE OF TRUST AGREEMENT No. 51296-6; ROGERS, PAUL AND HANSEN; QUINN, JACOBS, BARRY, AND LATCHFORD; QUINN, JACOBS AND BARRY; JOHN B. HENDRICKS; FRANCIS E. SCHLAX; ROBERT V. HOGAN; FRANK A. KARABA; DON W. FEELEY; KIRK L. MacKINNON; GEORGE A. HANSEN; VLADIMIR G. URSE; LORETTO TENNES, INDIVIDUALLY AND AS TRUSTEE OF THE THOMAS BYRNE ESTATE LIQUIDATION TRUST; ALBERT BUCKLEY; DONALD MASTERSON; NORA CAMPION; THADDEUS ADESKO; AND ROBERT L. HUNTER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

THOMAS B. GILMORE,
RAYMOND OLSON, JR.,
SCHUMACHER, GILMORE, STAUB, WADE & JONES,
38 South Dearborn Street,
Chicago, Illinois,
Attorneys for Respondent, Kirk L. MacKinnon.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 692

PAUL V. BYRNE, JR.,

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vs.

CHICAGO TITLE AND TRUST COMPANY, INDIVIDUALLY AND AS TRUSTEE OF TRUST AGREEMENTS No. 42212 AND No. 44999; THE CATHOLIC BISHOP OF CHICAGO, A CORPORATION SOLE; THE FIRST NATIONAL BANK OF CHICAGO, INDIVIDUALLY AND AS TRUSTEE OF TRUST AGREEMENT No. 51296-6; ROGERS, PAUL AND HANSEN; QUINN, JACOBS, BARRY, AND LATCHFORD; QUINN, JACOBS AND BARRY; JOHN B. HENDRICKS; FRANCIS E. SCHLAX; ROBERT V. HOGAN; FRANK A. KARABA; DON W. FEELEY; KIRK L. MACKINNON; GEORGE A. HANSEN; VLADIMIR G. URSE; LORETTO TENNES, INDIVIDUALLY AND AS TRUSTEE OF THE THOMAS BYRNE ESTATE LIQUIDATION TRUST; ALBERT BUCKLEY; DONALD MASTERSON; NORA CAMPION; THADDEUS ADESKO; AND ROBERT L. HUNTER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ARGUMENT.

This Respondent, Kirk L. MacKinnon, is an attorney licensed by the State of Illinois. With respect to this Respondent, Petitioner states only the following in his "Statement of the Case":

"... During a short interlude on the seventh day of Petitioner's incarceration (January 16, 1963) the respondents Schlax, MacKinnon and Adesko conducted a proceedings (R. 24-41, A. 19-26) denominated 'judicial' and 'civil' in a small chamber provided by respondent URSE far removed from any court house to which petitioner was brought semi-comatose.

The brief inquisitorial proceedings, unburdened by any fact finding process, show the purported appearance of respondent MacKinnon (whom petitioner has yet to meet), as 'attorney for defendant' (R. 42, A. 26) as well as a novel notion of advocacy (R. 24-41, A. 19-26).

Pursuant to the orders entered by respondents, petitioner was punished by commitment to close confinement and the threat of forced psycho-surgery for the welfare of the public, until April 15, 1963 (R. 13, R. 11, A. 9)."

To clarify the Petitioner's "Statement of the Case", this Respondent calls the attention of this Court to the fact that the original Complaint which was dismissed by the District Court had attached to it as Exhibit D (R. 24-41) a transcript of the above-described commitment proceedings. Respondent MacKinnon's appearance (R. 42, A. 26) was likewise attached to the Complaint as part of Exhibit D and his representation in these proceedings is initially reflected in the said transcript on page 3 thereof:

"Mr. McKinnon: My name is Kirk McKinnon, 38 South Dearborn. I represent Mrs. Byrne, the mother.

The Court: And the patient himself, Paul Byrne, is that right?

Mr. Byrne: Yes."

These very same commitment proceedings were the subject matter of a prior action brought by this Petitioner which, as in the case of the instant suit, was predicated upon alleged violations of the Federal Civil Rights Act, 42 U. S. C. A. §§ 1983, 1985. The prior Complaint was dis-

missed for failure to state a claim upon which relief can be granted, and the refusal of the District Court to grant leave to file an amended complaint was affirmed by the Circuit Court of Appeals. *Byrne* v. *Kysar, et al.*, 7 Cir., 347 F. 2d 734 (1965); *certiorari* denied 383 U. S. 913; rehearing denied 384 U. S. 914; motions for leave to file second petitions for rehearing denied 384 U. S. 994.

In Petitioner's prior action under 42 U. S. C. A. §§ 1983, 1985, he joined as a party defendant another attorney who appeared in the same State Court commitment proceedings as Counsel for Petitioner's wife. Although Respondent MacKinnon, notwithstanding his appearance as an attorney in these same commitment proceedings, was not also made a party defendant in *Byrne* v. *Kysar et al., supra,* the ruling of the Circuit Court of Appeals on the question of the amenability of a private attorney to suit under 42 U. S. C. A. §§ 1983, 1985 is relevant here:

> ". . . Defendant Schlax's participation in the proceeding as a private lawyer did not make him a state functionary acting under color of law within the meaning of the Federal Civil Rights Act. Skolnick v. Martin, 7 Cir., 317 F. 2d 855, 857." *Byrne* v. *Kysar, et al.*, 347 F. 2d 734, at 736 (1965), *cert.* denied 383 U. S. 913.

Conclusion.

It is submitted that the Petitioner has not set forth any facts upon which to base a liability of this Respondent under the Federal Civil Rights Act, 42 U. S. C. A. §§ 1983, 1985. The Petition for the Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS B. GILMORE,
RAYMOND OLSON, JR.,
Attorneys for Respondent.

FILED
NOV 6 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

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Respondents.

MEMORANDUM OF RESPONDENTS HENDRICKS AND KARABA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FRANK A. KARABA, *pro se*
and as attorney for John B. Hendricks,
111 West Monroe Street,
Chicago, Illinois 60603.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 692

PAUL V. BYRNE, JR.,

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Respondents.

MEMORANDUM OF RESPONDENTS HENDRICKS AND KARABA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Plaintiff's petition is frivolous upon its face and should be denied for that reason.

The complaint which was dismissed by the District Court (R. 5) alleged, with respect to the defendants Hendricks and Karaba, only that they "are attorneys licensed by the State of Illinois and officers of the Courts of Illinois"

(par. 3 e)); that they, together with others, "in concert with the defendant Hunter in proceedings in both open court, and in defendant Hunter's chambers without any recordation thereof, conspired to distrain the plaintiff and coerce the plaintiff into accepting a prejudicial and nugatory settlement" (par. 14); and that all the acts of the defendants were "knowingly and wilfully done by each and all of them acting in concert for the purpose of impeding the due course of justice with the intention of injuring plaintiff and his property . . ." and were done "under color of the laws and usages of Illinois" in violation of plaintiff's constitutional rights (par. 15). The proposed amended complaint added no further allegations as to defendants Hendricks and Karaba (R. 421-425).

Neither of plaintiff's complaints gave defendants Hendricks and Karaba any notice of any alleged wrong committed by them. Interrogatories addressed to them (R. 75) suggest that plaintiff is aggrieved by attorney Karaba's representation of Hendricks in a collection matter (R. 41). Exhibit I to the complaint (R. 68-70) shows that the order, which is the subject matter of paragraph 14 of the complaint, was entered by Judge Hunter on October 8, 1965, and provided for the distribution of funds to certain persons. Paragraph 3(e) provided for distribution of "$700.00 to John Hendricks judgment creditor of . . . Paul V. Byrne, Jr. in full satisfaction and release of garnishment proceedings against The First National Bank of Chicago, pursuant to agreement and stipulation of said John Hendricks to dismiss garnishment proceedings in 64 M1-510834." Following Judge Hunter's signature is the notation "Order Approved" followed by signatures of Paul V. Byrne, Jr. (petitioner herein) and his attorney, Harry R. Booth, in that case. No allegation has been made by plaintiff that Mr. Booth did not properly represent his interests in that case.

The complaint did not charge that defendants Hendricks and Karaba had anything to do with the commitment proceeding which long preceded the above described collection matter and which was the subject matter of prior litigation between plaintiff and others, including one of the defendants here. *Byrne* v. *Kysar*, 347 F. 2d 734 (7th Cir. 1965) certiorari denied 383 U. S. 913, rehearing denied 384 U. S. 914.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK A. KARABA, *pro se*
and as attorney for John B. Hendricks,
111 West Monroe Street,
Chicago, Illinois 60603.

November 3, 1967.

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No. 692

In the

Supreme Court of the United States

OCTOBER TERM, 1967

PAUL V. BYRNE, JR.,

Petitioner,

vs.

CHICAGO TITLE AND TRUST COMPANY, individually and as trustee of trust agreements No. 42212 and No. 44999; THE CATHOLIC BISHOP OF CHICAGO, a corporation sole; THE FIRST NATIONAL BANK OF CHICAGO, individually and as trustee of trust agreement No. 51296-6; ROGERS, PAUL and HANSEN; QUINN, JACOBS, BARRY, and LATCHFORD; QUINN, JACOBS and BARRY; JOHN B. HENDRICKS; FRANCIS E. SCHLAX; ROBERT V. HOGAN; FRANK A. KARABA; DON W. FEELEY; KIRK L. MacKINNON; GEORGE A. HANSEN; VLADMIR G. URSE, LORETTO TENNES, individually and as trustee of the Thomas Byrne Estate Liquidation trust; ALBERT BUCKLEY; DONALD MASTERSON; NORA CAMPION; THADDEUS ADESKO; and ROBERT L. HUNTER,

Respondents.

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI

AND

AMPLIFICATION OF REASONS FOR GRANTING PETITION

PAUL V. BYRNE, JR.,
10 South LaSalle Street
Chicago, 60603, Illinois
Petitioner

NO. 692
In The
SUPREME COURT OF THE UNITED STATES
October Term, 1967

PAUL V. BYRNE, JR.,
Petitioner

-v-

CHICAGO TITLE AND TRUST COMPANY, etc., et al.,
Respondents

PETITIONER's REPLY TO BRIEFS IN OPPOSITION OF RESPONDENTS FIRST NATIONAL BANK OF CHICAGO, HANSEN, FEELEY, KARABA, MacKINNON, HENDRICKS, ROGERS, PAUL AND HANSEN; AND AMPLIFICATION OF REASONS FOR GRANTING PETITION

The contentions raised in the briefs of respondents in opposition to the petition for certiorari have brought into clear focus the role of this Court as a national tribunal created to serve and maintain the principle of national supremacy by judicial enforcement of the Bill of Rights where local parochial tyrannies and petty provincial despotisms supplant the usual and accepted standards of judicial procedure in order to circumvent the national Constitution's guarantees of personal rights of liberty and property.

None of these respondents have advised the Court that there are contentions raised in their briefs and memoranda which had not been considered upon any hearing and argument in the courts

below in this case, as appears in the record filed herein.

A.

WITH RESPECT TO CONTENTIONS RAISED IN BRIEF OF FIRST NATIONAL BANK OF CHICAGO AND MEMORANDUM OF KARABA

Had petitioner been afforded the opportunity to be heard on points now being urged for the first time upon this Court he would have suggested that the reliance of the respondents on the order of Judge Hunter entered on October 8, 1965 (R. 68-70, First National brief, pp. 4-7; Karaba memorandum, p. 2) to exculpate their devastation of petitioner's estate is misplaced.

Neither the First National Bank of Chicago, nor the law firm of Rogers, Paul and Hansen, nor Mr. Hansen, nor Mr. Hendricks, nor Mr. Karaba, nor Mr. Feeley, in their proper person or by counsel, have any appearance on file, or of record in the proceedings before Judge Hunter. Nor was any of the respondents a party to the action in a representative capacity or otherwise. Nor did any of the respondents present any pleadings or motions, orally or on paper, in the subject proceedings---although they are telling this Court that "* * * they represented The First National Bank of Chicago in the proceedings referred to by Petitioner * * *" and "These respondents first appearance in an action involving Petitioner was on May 7, 1964 * * *" and "On May 7, 1964, the Bank was served with a Petition * * *" (First National brief, p. 2).

By a process of judicial legerdemain Mr. Karaba is able to get $700.00 for his client, Hendricks from "judgment creditor Paul V. Byrne, Jr., " purportedly in consideration of release,

satisfaction, and stipulation to dismiss a"garnishment proceedings No. 64 M1- 510834" against First National Bank of Chicago as trustee of petitioner's funds (Karaba brief, p. 2); and the First National Bank of Chicago took $1,000.00 of petitioner's funds---in addition to fees previously collected--- through the largesse of a kindly Judge (First National brief, p. 6).

That there is no legal sanction for such antics is obvious under the well-settled principle of law in Illinois that trust interests are not subject to garnisment proceedings (Baumgarden v Reconstruction Finance Corp., 131 F 2d 741, 7 cir, 1943); and if Messrs. Karaba, Hendricks and Hansen were unaware of it, their co-respondent First National Bank of Chicago was clearly aware: Young v First National Bank of Chicago, 85 FSupp 68, DC Ill., 1949. Illinois courts adhere to this principle under the rule that property in custodia legis is not subject to garnishment proceedings. Harris v Valen Const. Co., 200 NE 2d 70, 49 Ill App2d 265, 1964.

In Illinois where a garnishment proceeding is an ancillary statutory action in the nature of process to obtain satisfaction of a judgment rendered in a principal action or proceeding (American Auto. Ins. Co. v Freundt, 103 F2d 613, 7 cir, 1939; First Nat Bank of Palatine v Hahneman Inst. of Chicago, 356 Ill. 366, 190 NE 707,1934) garnishment proceedings must issue out of the court in which the judgment was rendered (Nesbitt v Dickover, 22 Ill App 140) and which had jurisdiction of the principal action. Selenick v Mann, 239 Ill App 589.

In prevailing upon Judge Hunter, sitting as a chancellor of the County Department of the Cook County Circuit Court, to invoke his summary fieri facias execution in the garnishment proceedings of the Mmicipal Department of Chicago, No. 64 M1-510834 (Appendix A, attached hereto; Karaba brief, p.2), the respondents led a compliant Judge into entering an order which is an absolute nullity.

The record in the garnishment proceedings shows that

the respondent, Hendricks, by his attorney, the respondent, Karaba, served his summons in garnishment on the respondent, First National Bank of Chicago "as trustee under the will of Walter S. Barnes". With all of his inherent power as a chancellor of the Divorce Division of the County Department, presiding in the matter of Byrne v Byrne, No. 63 C 8551 (First National brief, Karaba brief), Judge Hunter had no constitutional, statutory, equitable, nor inherent power to supervise or control the process of any other Illinois court. The Illinois Supreme Court has made it clear:

> "Every court has the inherent right to control its own process and, unless, authorized by statute, no other court may interfere with that right." People v Wallace, 332 Ill. 427,434, 163 NE 820(1928)

It is also well-settled in Illinois that where the court lacks the power to make or enter a particular order, the order is void:

> "It is held in Barnard v Michael, 392 Ill. 130, 63 NE2d 858, that a judgment entered by a court which lacks jurisdiction of the parties or of the subject mattter, or which lacks the inherent power to make or enter the particular order involved, is void, and may be attacked at any time or in any court either directly or collaterally. See Woodward v Ruel, 355 Ill. 163 * * *" De Phillips v DePhillips, 211 NE2d 147, 150, 63 Ill App 2d 19 (1965). (emphasis as found).

The suggestion of respondents that the signature of petitioner, and of his attorney, appearing under "ORDER APPROVED" (First National brief p. 7) could infuse an otherwise void order with any vitality is athwart a rule familiar to the

Illinois Supreme Court:

> "It is a familiar rule that when a court has no jurisdiction of the subject matter it cannot be conferred by consent * * * A judgment entered without power to enter the particular judgment is void * * * A party is not estopped by failing to raise the question in the trial court * * *" Toman v Park Castles Apt. Bldg. Corp., 31 NE 2d 299, 304, 375 ILL. 293 (1941).

---any more than the suggestion that jurisdiction could be conferred by waiver, estoppel, or appearance of the parties in the action. Jackson v Jackson, 204 NE2d 153, 156, 55 Ill App2d 77 (1965).

While the First National Bank of Chicago and its counsel are attempting, now, to show in this Court that they "appeared", "represented", and "were served" (First National brief, p. 2-4) in certain Illinois state court proceedings involving petitioner, the record in those proceedings shows that they were mere interloping strangers to the action; and they add to their brief (First National brief, pp 1a-4a) in this Court, the opinion of an Illinois Appelllate court in an action where they prevailed over petitioner on their contention that they had no duty to appear and defend in the subject action (First National brief, p. 4a).

And while they conclude their argument with a litany of judges, state and federal, who supposedly have supported their contentions, these respondents omit any reference to the only reported opinion on the merits at issue where an Illinois appelllate court could find no basis for the improvident "injunctive orders" of Judge Hunter upon which First National Bank relies to justify its refusal to fulfill its fiduciary duties to petitioner: Byrne v Byrne, 211 NE2d 1, 62 Ill App2d 336, (1965).

While respondent Karaba urges this Court to consider his efforts as his client, Hendricks', collection agent before Judge Hunter (Karaba brief, p.2) as coating his collection tactics with colorable legality--- notwithstanding his interloping status in the action then before Judge Hunter has left petitioner without any means to obtain the "release", "satisfaction", and "stipulation to dismiss" for which Hendricks received $700.00 from petitioner (Karaba brief,p 2) ---no release, satisfaction or stipulation to dismiss garnishment proceedings has been filed in the intervening 2 years.

Such extra legal "juice-loan" collection tactics can only commend themselves to one dedicated to a profanation of the law---hardly a proper commitment for Karaba's client as long-time Secretary of the State of Illinois board of law examiners.

B.

WITH RESPECT TO CONTENTIONS OF RESPONDENT Mac KINNON

Respondent MacKinnon's attempts at "clarification" of the record in this case for the benefit of the Court would have better served their end had he let the record speak for itself without personal interpretive contortions.

By what strange notion of advocacy a lawyer can say that he "represented" (MacKinnon brief, p. 2) a client, or his "client's" interest, without so much as having had a single spoken or written word with the "client"--- before, during, or after the subject proceedings--- is unclear.

Nor is there any suggestion in the record that

MacKinnon's self-arrogated appointment as petitioner's attorney was made by leave or order of any court or by any person acting on petitioner's behalf.

The record shows (R. 24-41) that MacKinnon's sum total of unauthorized "advocacy" on petitioner's behalf consisted of unburdening himself of his expertise on th relative merits of Illinois lunatic asylums.

By directing this Court's attention to a short excerpt from the state court proceedings:

"The Court: And the patient himself, Paul Byrne, is that right?". (MacKinnon brief, p.2)

MacKinnon reinforces petitioners contention that the question was addressed to petitioner and not to Mr. MacKinnon --- the pronoun "himself" is otherwise meaningless surplusage as the court reporter's notes (R. 24 and (R. 27) bear out.

The state court record in its entirety (R. 24-41) shows that respondent MacKinnon did not use, or attempt to use, a single procedural tool of an advocate to save his alleged "client" (petitioner) from the fate of swine in Illinois.

Respondent MacKinnon's misplaced reliance on the prior case, Byrne v Kysar, 347 F2d 734, (CA-7, 1965) is based on the mis-statement of fact that: "The prior Complaint was dismissed for failure to state a claim upon which relief can be granted * * *"(MacKinnon brief p. 2-3) whereas, in fact, the prior case was dismissed for want of jurisdiction (Byrne v Kysar, No. 14911,(CA 7 Appendix to Record, p. 39) and without being a judgment on the merits does not serve as a bar by way of "res judicata", "estoppel by judgment", or "collateral estoppel" to any subsequent related action (Petition for certiroari, p. 18).

CONCLUSION

The radical departure from the usual and accepted standards of judicial procedure by the respondents in this case, and as is apparent on the face of record herein, adequately states a claim which should be considered on its merits in order to ensure judicial enforcement of the Bill of Rights.

Respectfully submitted,

/s/ Paul V. Byrne, Jr.,
Petitioner
Rm 1030
10 South LaSalle Street
Chicago, Illinois, 60603

APPENDIX A.

THE MUNICIPAL COURT OF CHICAGO
First Municipal District
The Circuit Court of Cook County, Illinois

JOHN B. HENDRICKS, plaintiff-	)	
v.	)	
PAUL V. BYRNE, JR. defendant-	)	No. 64 M -- 510834
and	)	
THE FIRST NATIONAL BANK OF CHICAGO, Trustee under the will of Walter S. Barnes, Deceased, garnishee	)	* * *

Affidavit for Garnishment, Non-Wage

FRANK A. KARABA on oath states:

1. Judgment was entered on May 7, 1964 for judgment creditor John B. Hendricks and against judgment debtor Paul V. Byrne, Jr.

* * *

4. I believe The First National Bank of Chicago, Trustee u/w of Walter S. Barnes, dec. is indebted to the judgment debtor or has in his possession, custody or control property belonging to him or in which he has an interest.

I request that summons issue directed to garnishee.

/s/ Frank A. Karaba

Signed and sworn to before me May 20, 1964
/s/ _____/ (Notary Public)
Name. Frank A. Karaba. Attorney for Plaintiff.
* * *